Metropolitan Teletronics Corp., and its alter egos and successors, Capitol Electronics of 4109 Inc., and Alpay Kabountzis, a/k/a Alpay Kavounzis, a/k/a Alpay Kavountzis,[1] a/k/a Al Kay, an Individual *and* Amalgamated Industrial Union 76B and its Divisions, Affiliated with International Union of Electrical Workers, AFL–CIO. Cases 22–CA–17446 (1–2)

July 19, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On April 19, 1991, Administrative Law Judge Arline Pacht issued the attached supplemental decision. The Respondents filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions and to adopt the recommended Order.

We agree that Respondent Capitol Electronics of 4109 Inc. (Capitol) is the alter ego of Respondent Metropolitan Teletronics Corp. (Metropolitan) for the reasons stated by the judge. In agreeing with the judge that Respondent Alpay Kavountzis is the alter ego of Metropolitan and Capitol and jointly and severally liable for backpay owed to the former Metropolitan employees, we emphasize the judge's finding that Kavountzis' intent in creating Capitol was to evade complying with the Board's remedy in the underlying unfair labor practice case.[4]

The Board has stated that it will look beyond organizational form to hold an individual officer of a company liable for that company's backpay liability when the individual is ''no more than an *alter ego* . . . or was in active concert or participation in a scheme or plan of evasion . . . .'' *Riley Aeronautics Corp.*, 178 NLRB 495, 501 (1969). We find the evidence—among other things, Kavountzis' sole responsibility for the unfair labor practices, his intent in creating Capitol, his evasive and uncooperative behavior throughout these proceedings in the face of documentary evidence that he commingled personal and corporate funds—establishes that Kavountzis actively engaged in a scheme to evade complying with Metropolitan's backpay obligation. Therefore, we agree with the judge that Alpay Kavountzis is the alter ego of Capitol and Metropolitan and find him jointly and severally liable with Capitol for satisfaction of the Board's remedial order against Metropolitan.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Metropolitan Teletronics Corp., Jersey City, New Jersey, Capitol Electronics of 4109 Inc., and Alpay Kabountzis, a/k/a Alpay Kavounzis, a/k/a Alpay Kavountzis, a/k/a Al Kay, an Individual, Union City, New Jersey, their officers, agents, successors, and assigns, shall take the action set forth in the recommended Order.

MEMBER OVIATT, concurring.

I fully agree with my colleagues in adopting the judge's conclusion that Capitol Electronics of 4109 Inc. is the alter ego of Respondent Metropolitan Teletronics Corp. and is therefore jointly and severally liable for backpay owed to the former Metropolitan employees in accordance with the Board's initial decision in this case (279 NLRB 957 (1986)).

I also concur in finding that Alpay Kavountzis is the alter ego of Capitol and Metropolitan and that he is also jointly and severally liable as an individual for backpay under the Board's remedial order against Metropolitan.

In addressing this latter issue, I begin with the fundamental premise that ''the insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception.'' *NLRB v. Deena Artware, Inc.*, 361 U.S. 398 (1960) (citation omitted). As this Board has noted, ''Easily the most distinctive attribute of the corporation is its existence in the eye of the law as a legal entity and artificial personality distinct and separate from the stockholders and officers who compose it.'' *Riley Aeronautics Corp.*, 178 NLRB 495, 501 (1969) (citation omitted). In *Riley*, as in this case, the General Counsel sought for the first time in the compliance proceeding to impose personal liability for backpay on an individual, Jack Riley, who was president and controlling stockholder of several corpora-

[1] We have amended the caption to track the General Counsel's compliance specification caption.

[2] The General Counsel filed a special appeal from the judge's refusal to grant a motion to strike par. II of the Respondents' answer to the compliance specification. The judge stated in fn. 7 of her decision that the motion was still pending before the Board when her decision issued. The General Counsel withdrew the appeal, however, on March 18, 1989.

[3] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] 279 NLRB 957 (1986), enfd. 819 F.2d 1130 (2d Cir. 1987).

[5] In finding that Kavountzis commingled corporate and personal funds, the judge specifically referred to only one occasion on which Kavountzis deposited into his own account a check payable to Metropolitan. The record shows, however, that Kavountzis deposited a company check into his personal account at least twice, once while he was in Jersey City and once while in Union City. As further evidence of Kavountzis' failure to maintain separate accounts for corporate and personal affairs, we rely on Lewison's testimony that while Metropolitan was still his tenant, Kavountzis occasionally paid the rent for the business out of his personal account.

tions and who personally had committed the unfair labor practices. In addition, the Board found that Jack Riley had ''a penchant'' for setting up corporations, involving one corporation in the affairs of another, reorganizing corporate functions and activities, and using one corporation to assist or rescue another. Nonetheless, the Board rejected the imposition of individual liability finding that:

> To require him to make good the corporation's backpay liability out of his personal funds would operate to defeat the very purpose of his incorporating the business to escape individual liability. If the corporate funds are insufficient to meet the backpay obligation, the Board's recourse is that of a ''creditor,'' which includes enforcing the claim in insolvency or bankruptcy proceedings. *Nathanson v. NLRB*, 344 U.S. 25, 27. Ibid. [Citation and footnote omitted.].

In this case, the judge found that Kavountzis impeded the Board's efforts to obtain relevant business records. The General Counsel nonetheless was able to uncover some financial data to the effect that Kavountzis on some occasions commingled funds. Kavountzis failed to produce additional documentation to rebut the inferences of commingling. Further, on the basis of her credibility resolutions, the judge found that Kavountzis ''engaged in the obstructive and duplicitous conduct . . . to deliberately frustrate enforcement of the Board's Order against Metropolitan.'' In light of the judge's specific findings of obstructive behavior and under the particular circumstances involved, I find this case to be the exception in which ''piercing the corporate veil'' is warranted. *Riley Aeronautics*, supra at 501. Were these findings and circumstances not in this case, I would honor the sanctity of the corporate veil.

Dorothy Karlebach, Esq., for the General Counsel.
Robert Ferris, Esq., of New York, New York, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. On May 19, 1986, the National Labor Relations Board (the Board), issued a Decision and Order[1] in the above-captioned case[2] holding that Respondent, Metropolitan Teletronics Corp. (Respondent Metropolitan), violated Section 8(a)(l) and (5) of the National Labor Relations Act (the Act) by failing to bargain over the effects of its decision to relocate from New York City to Jersey City, New Jersey. The Board ordered Respondent Metropolitan, inter alia, to make whole all employees in the bargaining unit represented by the Amalgamated Industrial Union Local 76B and its Divisions, affiliated with the International Union of Electrical Workers, AFL–CIO (the Union), from May 24, 1986 until the occurrence of one of a number of alternative events specified in the Board's Order, for losses caused by Respondent's relocation. Thereafter, on April 7, 1989, the United States Court of Appeals for the Second Circuit entered a judgment enforcing in full the Board's Order, including its backpay provisions.[3]

Subsequently, a controversy developed over the amount of backpay due the employees. Consequently, on December 6, 1990, the Regional Director for Region 2 issued a compliance specification and notice of hearing alleging that Respondent Metropolitan, its *alter ego* or *Golden State* successor,[4] Capitol Electronics of 4109 Inc., and Alpay Kavountzis, in his individual capacity, owed the affected employees $1,090,163, plus interest. The compliance specification notified Respondent that an answer was required with 21 days in conformance with Section 102.54 of the Board's Rules and Regulations.

When Respondent failed to submit a timely answer, the Regional Director notified Respondents of the failure and granted an extended period for such filing. On January 21, 1991, Respondents filed an answer which, apart from providing the proper spelling of Alpay Kavountzis' name and admitting his relationship to Respondents Metropolitan and Capitol[5], generally denied the allegations in the compliance specification. After receiving Respondent's answer and concluding that it did not comply with Section 102.54 of the Board's Rules, Region 22 advised Respondents by mail of the deficiencies in their answer, together with a copy of the applicable rules and regulations and a case citation to Board precedent involving a similar issue. The Region's letter further advised Respondents that if a legally sufficient answer was not submitted by February 5, 1991, a Motion for partial Summary Judgment would be filed. Notwithstanding this notice, Respondents failed to file an amended answer. Because the Region was seeking expedited relief,[6] it submitted to me a motion to strike paragraphs I, II, and III of Respondent's answer, rather than moving for summary judgment before the Board. The Respondents filed an opposition to the motion.

Specifically, government counsel alleged in the motion to strike that by entering a general denial, Respondent had failed to comply with the Board's rules requiring specificity with regard to paragraph I, the backpay period, paragraph II, measurement of the backpay liability period, and paragraph III, the measure of gross backpay. At counsel's request for

[1] This case was transferred from the Board's Regional Office in New York to Newark, New Jersey. Prior to transfer, it originally was designated 2–CA–1975 and 2–CA–19657.

[2] 279 NLRB 957.

[3] 819 F.2d 1130 (unpublished order).

[4] *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

[5] The name of the individual who admittedly was and is the sole officer and shareholder of Respondents Metropolitan and Capitol, is Alpay Kavountzis. (See Respondent's answer, par. 7.) For convenience sake, he was addressed as Al Kay throughout the instant proceeding.

[6] On December 7, 1990, the Honorable Harold A. Ackerman, U.S. District Court for the District of New Jersey, granted the petition of the Regional Director for Region 22 for a temporary restraining order prohibiting Respondents in this case from dissipating assets and requiring, inter alia, access to Respondents' books and records. Following an evidentiary hearing on December 21, 1990, the court issued an oral decision, supplemented by a written, unpublished opinion granting the Region's motion for a preliminary injunction pursuant to Sec. 10(j) of the Act. *Pascarell v. Metropolitan Teletronics Corp.* (D.N.J. 1990). Under Third Circuit precedent, injunctive relief is limited to 6 months, although extensions may be obtained under certain circumstances. The Court's opinion is entered into the record of this case as ALJ Exh. 1.

an expedited determination, I issued an oral ruling during a telephonic pretrial conference call with the parties which I restated on the record on February 19, 1991, the first day of trial, granting the motion as to paragraphs I and III. However, I reserved ruling on paragraph III on the grounds that Respondents Capitol and Kavountzis, in his individual capacity, were not named in the underlying complaint; therefore, until evidence was adduced at the compliance proceeding which proved their alter ego status, their liability for payment and the corollary question as to the duration of the backpay period, could not be determined. See *Denart Coal Co.*, 301 NLRB 391 (1991).[7]

This matter was tried before me in Newark, New Jersey, on February 19, 20, and 25, at which time the parties were afforded full opportunity to be heard, to call and examine witnesses, and to argue orally on the record. Thereafter, both parties submitted briefs which have been carefully considered.

Having granted Board counsel's motion to strike paragraphs I and III, the two issues which remained to be resolved on the basis of the pleadings and the entire record[8] in this case were: (1) whether Respondents Capitol and Alpay Kavountzis were alter egos of Respondent Metropolitan with joint, several, and individual liability for the backpay owed to the employees, and (2) the accuracy of the discriminatees' interim earnings as alleged in paragraph IV and set forth in the appendices to the compliance specification.

FINDINGS OF FACT

Background: The Unfair Labor Practice Case

As detailed in the underlying Board decision, until 1983, Respondent Metropolitan reconditioned and sold used telephones at two plants, one in New York City where approximately 40 production employees were represented by Local 76B and the other in Union City, New Jersey, where bargaining unit members were represented by sister Local 148. Suffering severe financial reverses, Respondent was compelled to sell its New York facility. Without affording the New York City employees an opportunity to transfer, or disclosing its move and bargaining with Local 76B about the decision to relocate or its effects in a timely manner, Respondent transferred its operations from New York and Union City to another, larger facility at 975 Garfield Street, Jersey City, New Jersey. The Board found that Respondent had no duty to bargain about the relocation decision itself and acted lawfully in recognizing Local 148 as the bargaining representative for unit employees at the Jersey City facility. However, the Board held that the Company violated the Act by failing to bargain with Local 76B over the effects of its relocation decision. 279 NLRB supra at 957.

To remedy this wrong, the Board ordered Respondent not only to engage in effects bargaining with the Local, but also to make the employees whole for losses suffered as as result of its unlawful conduct from 5 days after the date of its decision until occurrence of the earliest of the following conditions: (1) the date the Company bargained to agreement with the Local as to the effects of the plant shutdown on the employees; (2) a *bona fide* impasse in bargaining occurred; (3) the Union failed to request bargaining or commence negotiations within 5 days of the Company's offer to bargain; and (4) the Local failed to bargain in good faith. Id. at 961, citing *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). Respondent's failure to comply with any one of these conditions and its insistence that Metropolitan ceased doing business in 1988 led to the issuance of the compliance specification in this proceeding.

Metropolitan's Jersey City Operations

Throughout the time that Metropolitan occupied the Jersey City premises, from April 1983 to the beginning of 1989, Kavountzis, Respondent's owner and sole shareholder, continued the same business: the repair, refurbishing, repackaging, and resale of secondhand telephones.[9] The Garfield Street premises were spacious enough to accommodate a great amount of equipment as well as an expanding work force. Thus, uncontroverted evidence establishes that Respondent first owned and then leased three contiguous buildings which were part of a nine building complex at the Garfield Street address. Workbenches were housed in all three buildings at which employees reprocessed phones using a variety of small, hand-held tools such as grip blasting and polishing equipment, paint brushes, and stamping presses. Within a year following the move to Jersey City, the work force expanded to over 60 employees, but by the end of 1988, the number had dwindled to approximately 10 employees.

The diminishing work force apparently reflected Respondent Metropolitan's economic decline at the Jersey City facility.[10] As a result, Kavountzis and Paul Lewison, Respondent's landlord, were locked in a continuing controversy over Metropolitan's failure to pay its rent on time. In an effort to collect rent due, Lewison often visited the Garfield Street site, becoming familiar with the operations and with the faces of the employees.

Toward the latter part of 1988, Kavountzis informed Lewison that he intended to move Metropolitan. In fact, by the end of that year, Respondent had ceased doing business at the Garfield Street location. However, it took much longer for Kavountzis to remove the balance of Metropolitan's material and equipment from the facility. Lewison did not restrict his access, so for months after the move, Kavountzis returned to the Garfield Street plant and took van loads of material away with him. Even so, he left much behind. Therefore, in order to ready the premises for a new tenant in mid-1989, Lewison had his own employees remove three or four trailer loads of Respondent's materials from the Jersey City plant and deliver, unload, and store them in the

[7] By motion dated February 8, 1991, Board counsel filed a request for special permission to appeal from ruling of the administrative law judge. That motion currently is pending before the Board.

[8] Board exhibits will be referred to as Bd. Exh.; Joint Exhibits as Jt. Exh. and Respondent's Exhibit as R. Exh.

[9] Respondent first purchased the Jersey City buildings, but later, after selling them to a partnership called 975 Garfield Avenue Associates, continued to occupy the same space as a tenant. In 1987, Paul Lewison, one of the Garfield Avenue Associates, contracted to purchase the complex from his partners.

[10] The Board noted that on moving to Jersey City, a State agency authorized Respondent to sell almost a million dollars in tax exempt bonds so that it could prepare the new facility for expanded production which would pave the way for new jobs. The Company was unable to sell any of the bonds and the planned expansion had not taken place at the time of the trial in the underlying unfair labor practice proceeding. 279 NLRB at 957 fn. 4.

basement of Respondent's new business in Union City, New Jersey.

Respondent's Union City Facility

Because Respondent left Jersey City still owing rent for the Garfield Street premises, Lewison pursued Kavountzis to his new Union City address, a single building with two entrances; one at 4105 Bergenline Avenue and the other at 502 Forty-First Street. Lewison sought Kavountzis at that building on at least a half dozen occasions. After recovering payment for a $1500 bounced check in April 1989, he took legal action to collect other moneys allegedly owed to him.[11]

Lewison testified that he had ample opportunity to observe Respondent's facility and operations during his repeated dunning expeditions to Union City. He stated that the building, which bore a sign identifying it as Capitol Electronics, housed a retail store where a few clerks sold televisions, camcorders, and other electronic equipment. Lewison further described another area to the rear of the retail portion of the store, where approximately 20 to 30 feet of workbenches, presumably some of the same ones previously used at the Garfield Avenue plant, were installed. He observed a half dozen workers, two of whom he recognized from the Garfield Street location, refurbishing telephones—''taking the innards of the telephones . . . hooking them up . . . cleaning and checking the ringers.'' (Tr. 107). Although Lewison did not see the basement at this building, he believed there was one because he understood that his employees had transferred equipment there from the Jersey City facility. Moreover, on one occasion, he saw Al Kay descending the steps to the basement. In short, according to Lewison, Respondent's employees, several of whom had previously worked for Metropolitan, apparently were working for Capital, performing the same work at the new Union City location as they had at the Jersey City plant, albeit on a reduced scale.

Mario Pabon, a driver for United Parcel Service (UPS), confirmed salient portions of Lewison's testimony. Thus, like Lewison, he testified that a retail operation involving the sale of VCRs, components, and other electrical equipment, occupied the front portion of the building on Bergenline Avenue. In the rear, however, where he reported on a daily basis to pick up and deliver packages, he saw a few employees fixing what he believed to be broken telephones.[12] He recalled that until 3 or 4 months prior to the instant trial, packages to and from this location bore the name of Metropolitan. Since that time, he indicated the name, Capitol Electronics, was affixed to the packages.

Metropolitan and Capitol shared more than a common situs. Documents introduced into evidence deomonstrated that Metropolitan and Captitol used the same UPS customer identification shipping number in 1989, notwithstanding the fact that UPS requires that each of its customers maintain a separate number.[13] Kavountzis offered two explanations for this anomaly. First, he claimed that the business name, Metropolitan Teletronic, had been prestamped on the UPS records. Therefore, he continued to use these prestamped forms for convenience sake until they were exhausted. Second, he suggested that he never bothered to obtain a new customer shipping number because the deposit required by UPS, varying from $1000 to $5000, was prohibitive.

The use of the same shipping number to identify the packages which were sent to and from Metropolitan and Captiol does not, of itself, definitively establish that they shared a common business purpose. In proving that Capitol functioned as Metropolitan's *alter ego*, it is far more important to determine what those packages contained.

To this end, Corrections Officer Anthony Stefanini, a purchasing officer for the Telecommunications Division of the New York City Department of Corrections for the past 5 years, provided telling evidence. Stefanini testified that he purchased reconditioned telephone bodies and telephone parts such as jacks, dials, receivers, transmitters, and touchtone pads from Metropolitan, dealing solely with Kavountzis at both the Jersey City and Union City addresses. Sometime in 1989, Kavountzis told him that Metropolitan was going to close down. Nevertheless, Stefanini continued to purchase the same products from Capitol that he had from Metropolitan. He explained, however, that in recent years, in addition to ordering telephones and telephone parts, he also ordered other equipment, including tape recorders, camcorders, and cassettes. Until 1991, when his department's purchases from Respondent sharply declined, Stefanini maintained that the dollar volume of purchases for reconditioned phones and related parts from Metropolitan and Capitol remained substantially the same.

On cross-examination, Stefanini testified that when he visited Metropolitan's premises in Jersey City, he observed a factory where the telephones such as those he ordered, were being reconditioned. However, he stated that on a visit to Respondent's Union City building, he did not see any place where phones were being reconditioned. All he observed was a retail operation in the front of the building with a warehouse to the rear. If phones were being revamped there, that was not visible to him.

Testimony offered by Frank Riccio, secretary-treasurer of the Local union which formerly represented employees at the Jersey City facility, was consistent with Stefanini's observations of Capitol's operations. Riccio stated that he had visited the Jersey City factory on a monthly basis and knew all of the employees working there. He further testified that sometime in early 1989, he made one 30-minute visit to the Union City building expressly to investigate whether Metropolitan was still in business there. He saw only a retail outlet attached to a warehouse facility and, in addition to Kavountzis, one unknown employee serving as a retail clerk. Riccio further testified that he thought his Local's business agent also determined that Capitol was not reconditioning telephones, although he was uncertain that the matter actually had been investigated.

Although neither Stefanini nor Riccio observed a factory operating at the Union City facility, business records of the New York City Department of Corrections, establish that Stefanini continued to purchase reconditioned telephones and related parts from Metropolitan and Capitol from May 1987 to May 23, 1990. These documents, created close in time to the events in question and for purposes independent of this

[11] In October 1989, Lewison filed a pro se complaint in a New Jersey Superior Court, seeking compensatory and punitive damages against Alpay Kavountzis, Metropolitan Telectronics and Capital Electronics, Inc. At the time of trial in the instant case, this action still was pending. See R. Exh. 1.

[12] Before coming to the United States from Puerto Rico, Pabaon obtained a 2-year degree in industrial engineering.

[13] Bd. Exh. 4, attachment 32, shows that July 25, 1989, is the last date that the name Metropolitan Teletronic Corp. appears stamped on a UPS record.

litigation, prove beyond question that throughout this period of time, the New York City Department of Corrections purchased reconditioned phones from the Respondents, for shipment by UPS. (See Bd. Exhs. 2 & 4 (33),(35)).

Notwithstanding this documentary proof, Kavountzis insisted that when Metropolitan went out of business and left the Garfield Avenue location in late 1988, he ceased reconditioning phones. He asserted that he opened Capitol Electronics in Union City exclusively as a retail store where he employed four to six clerks, depending on the season, to sell electronic equipment. He denied that he maintained a workshop in the rear of the Union City building. Conceding that he had a few workbenches in the area behind the store, Kavountzis explained that as a trained technician, he worked there himself when making minor adjustments to the VCRs, televisions, microwave ovens, and camcorders that are sold retail. All that he used in making these minor adjustments were simple tools such as as screwdrivers; he said he had no need for the presses and drills used at the Jersey City plant. In fact, he maintained that he sold all of the machinery and equipment from the Jersey City factory as scrap to Taiwan. However, Respondent did not produce any documentation of such sales.

In an effort to refute the real evidence showing that Capitol continued to supply one of Metropolitan's major customers, Kavountzis claimed that Capitol sold reconditioned telephones on only one occasion.[14] Thus, he alleged that after a prison fire, he helped the Department of Corrections deal with what was an an emergency situation by ordering reconditioned phones from another supplier of such merchandise, a company he identified only as K.M. Enterprises, purportedly located in some unspecified place in Alabama.[15] Although Kavountzis indicated he would furnish documentation to support this contention, none was forthcoming. Not a single purchase order, sales slip, or shipping receipt was introduced to corroborate Kavountzis' bare allegation that Capitol merely served as a conduit. Moreover, Kavountzis' claim that he furnished reconditioned phones to the Department of Corrections on only one occasion was flatly contradicted by the Department of Corrections' purchase orders. These records establish that Capitol sold reconditioned phones and parts to this client on a recurring basis at least until May 1990, in dollar amounts similar to those paid to Metropolitan in the past.

Whether Capitol also sold reconditioned phones to other customers is a matter of speculation. However, there is some evidence which points in that direction; namely, UPS pickup records showing that Respondent Capitol sent lightweight packages to such businesses as JM Telephone, Bargain World, EMS Communications, TIEA Teleco, and Mid-State Corrections Facility. (See Bd. Exhs. 4, (21), (23), (38), (41), & 56).) Packages delivered to these businesses weighed much the same as those sent to the New York Department of Corrections, indicating that the contents were not products sold in Respondent Capitol's retail store such as television sets, camcorders, and video tape players.

[14] In an earlier part of his testimony, Kavountzis admitted that the New York City Department of Corrections was the only former Metropolitan customer which Capitol still served.

[15] Kavountzis acknowledged that the New York Department of Corrections was one of Metropolitan's four customers. The others were department stores: Korvette, Two Guys, and Mays.

Board counsel apparently had difficulty in obtaining additional records documenting Capitol's or Metropolitan's business dealings. In a Federal district court opinion granting the Board a temporary injunction under Section 10(j) of the Act, enjoining the Respondents in this case from dissipating assets or destroying financial records pending the outcome of the instant administrative hearing, the Honorable Harold Ackerman wrote:

> I have listened to the testimony of Mr. Kay and I have had the opportunity to observe his demeanor, tears and all. His testimony strains the Court's credibility. For example, I do not know where the records of Metropolitan are. Mr. Kay has stated that he left them on Garfield Avenue. I find that very difficult to accept. I further asked Mr. Kay who his accountant was. Mr. Kay stated that he cannot remember who his accountant was. I questioned Mr. Kay about who his accountant is now. Mr. Kay said his account (stet) is an individual named Mario. Mr. Kay does not know Mario's last name (or his) . . . whereabouts, except for the fact that Mario allegedly lives in a house in Jersey City and operates out of his residence. Mr. Kay was unable to provide the Court with any other information about Mario. My conclusion after hearing Mr. Kay testify is that the Court is dealing with a very intelligent and a very evasive witness, who is, of course, a party to this case.

Pascarell v. Metropolitan Teletronics Corp., supra at 9.

Board counsel was able to produce canceled checks paid by the City of New York to both Metropolitan and Capitol which revealed that Kavountzis did not invariably treat these Companies' finances as separate and unrelated. Some checks made payable to Metropolitan were endorsed either by Capitol alone or by both Metropolitan and Capitol, and deposited into Capitol's account. (See Bd. Exhs. 3A (18), (19) & (20).) On one occasion, Kavountzis endorsed a check payable to Metropolitan in his own name and deposited it in his personal account. (Bd. Exh. 3A (17).)

Discussion and Concluding Findings

The Question of Liability

The Board has long held that an employer which commits an unfair labor practice may not avoid a remedial order simply by establishing a new business identity. Where the evidence establishes that the new employer is, in fact, ''merely a disguised continuance of the old employer'' the Board's order will issue not only to the immediate employer but to the employer's *alter ego* as well. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). The principal issues here are to determine, as the compliance specification alleges, whether (1) Respondent Capitol is Respondent Metropolitan's alter ego and thereby liable for the judgments in the Board's unfair labor practice proceeding, as enforced by the court of appeals and (2) whether Alpay Kavountzis may be held individually liable for rectifying the unfair labor practices committed by his Company.

Legal Standards Governing Alter Ego Status

In resolving questions concerning an alleged alter ego status, the Board consistently considers the following factors,

none of which are necessarily controlling: whether the two employers were under the same ownership and management; shared substantially the same business purpose in whole or in part; utilized the same operations, methods and equipment in the same premises, producing the same product for the same market or customers; and was created to evade its responsibilities under the Act. *Better Building Supply Corp.*, 283 NLRB 93, 94 (1987); *Watt Electric Co.*, 273 NLRB 655, 658 (1984); *William B. Allen*, 267 NLRB 700, 705 (1983), enfd. 758 F.2d 1145 (6th Cir. 1985); *Custom Mfg. Co.*, 259 NLRB 614 (1981).

Capitol is Metropolitan's Alter Ego

As discussed below, the more credible evidence in this case, evaluated in light of the factors outlined above, sustains the conclusion that Metropolitan continued to exist in the guise of Capitol Electronics, albeit on a much reduced scale.

Turning to the first element of common ownership and management, it is undisputed that Kavountzis was the sole shareholder and president of both corporations. As several witnesses attested who dealt with him on a frequent basis, and as Kavountzis himself acknowledged, he was a hands-on manager who always was on the scene. Unquestionably, Capitol functioned as a retail store, whereas Metropolitan did not. However, the addition of this new aspect to Respondent's business, which could be likened to a division within a single enterprise, does not defeat a finding that another part of Capitol's operations was no different than that of Metroplitan, except in scope. *Custom Mfg. Co.*, supra at 615. To the extent that Capitol continued to recondition and sell telephones and related parts, just as Metropolitan did, the two businesses shared a common business purpose. In finding that Capitol refurbished secondhand phones, I rely heavily on Board Exhibit 2 which shows beyond dispute that one of Metropolitan's major customers continued to purchase such equipment from Capitol. Given these records whose authenticity was unchallenged, Kavountzis' denial that Capitol engaged in the phone reconditioning business must be discounted. Clearly, the records of the New York City Department of Corrections and the testimony of its purchasing officer prove that he ordered the same reconditioned phones and related parts from Metropolitan and then from Capitol at the Union City location. In attempting to meet this compelling evidence by inventing a supplier in Alabama, Kavountzis only cast additional doubt on his credibility. Making matters even worse, he failed to produce a shred of corraborative documentation as he offered to do.

I also rely on Lewison's testimony that he observed on perhaps six different occasions, some half dozen employees in Capitol's back room performing the same work he had seen them do while Metropolitan still was located in Jersey City. At the time of the instant proceeding, Lewison was suing Metropolitan, Capitol, and Kavountzis for debts incurred while Metropolitan was his tenant. Thus, it could be argued that he was a biased witness who arranged his testimony to conform to the theory of his own civil action against the Respondents. However, while recognizing the possibility of bias, Lewison's calm and cogent manner persuaded me that whatever hostility he may have harbored against Respondents did not affect his account in this proceeding. This is not to say that I disbelieve Stefanini and Ricci, both of whom testified truthfully that they saw no employees refurbishing phones when they visited Capitol. I cannot account for this conundrum except to note that they each visited Capitol only once on an unidentified date whereas Lewison appeared at the Union City premises on more than several occasions.[16]

Board Exhibits 2 and 4 also demonstrate that Capitol not only supplied at least one-fourth of the consumers previously served by Metropolitan, but also shared the same address. Moreover, Lewison observed some workbenches, lighting, and tools installed in the Capitol building which he believed to be the same as those used in the Jersey City plant.

It cannot be denied that Capitol's facility was much smaller than Metropolitan's, fewer employees were engaged in refurbishing telephones there, and its operations appear to be much reduced in scale. However, the Board has held that none of these factors is sufficient to effectively overcome a finding of alter ego status where there was substantial continuity in ownership and management and where the former business purpose was continued as part of the succeeding operation. See *Better Building Supply Corp.*, supra at 95; *William B. Allen*, supra at 706; *Custom Mfg. Co.*, supra at 615.

Although the final factor, unlawful intent, is not critical to finding alter ego status, it, too, may be present here inferentially. The evidence suggests that Metropolitan was not a successful business: the number of Metropolitan employees at the Jersey City factory fell from a high of 60 or 70 in 1983 to a low of 10 by late 1988; Kavountzis lost the Jersey City property by foreclosure and then, as a tenant, found it difficult to pay the rent there. Thus, Kavountzis probably was responding to Metropolitan's declining fortunes by moving to the smaller Union City building, cutting the work force in half, and opening a retail store. If that was all that he did, Metropolitan's liability to comply with the Board's remedy in this matter would have ended when it ceased doing business in Jersey City in December 1988. But there was more. In addition to running a retail enterprise, Capitol continued the same operations, in a scaled-down form, as those once performed by Metropolitan. Kavountzis' failure to produce any records which would refute compelling documentation proving that he continued in the phone refurbishing business leads to the inference that Respondents engaged in subterfuge to evade complying with the Board's remedy in the underlying unfair labor practice case.

In sum, I conclude that Capitol Electronics is the alter ego of Metropolitan Teletronics. As such, Capitol is derivatively liable to provide the remedy required by the Board.

Kavountzis is Individually Liable for Backpay Due Metropolitan Employees

The compliance specification also alleges that Alpay Kavountzis is the alter ego of Respondents Metropolitan and Capitol and as such, personally liable for the backpay due to the former Metropolitan employees. As a general rule, individual stockholders are insulated from the obligations incurred by their corporations. See *NLRB v. Deena Artwear, Inc.*, 361 U.S. 398, 402–403 (1960). However, the Board has carved exceptions to this rule and held individual respondents and their corporate entities liable for backpay remedies where the individual has actual operational and financial con-

[16] None of these witnesses had the opportunity to observe the basement of the Union City building.

trol of the enterprise. *Weldment Corp.*, 275 NLRB 1432, 1433 (1985);[17] *Master Food Services*, 262 NLRB 804, 811–812 (1982). The Board also will overcome its reluctance to pierce the corporate veil where:

> it is employed to perpetrate fraud, evade existing obligations or circumvent a statute. . . . Thus, in the field of labor relations, the Courts and the Board have looked beyond organization form where an individual or corporate employer was no more than an *alter ego* . . . or was in active concert of participation in a scheme or plan or evasion . . . or siphoned off assets for the purpose of rendering insolvent and frustrating a monetary obligation such as backpay . . . or so integrated or so intermingled his assets and affairs that ''no distinct corporate lines are maintained.''

Concrete Mfg. Co., 262 NLRB 727, 729 (1982) (quoting *Riley Aeronautics Corp.*, 178 NLRB 495, 501 (1969)).

Here, the evidence is uncontroverted that Kavountzis, the only stockholder in both Metropolitan and Capitol, was in sole control of and responsible for the operations of Metropolitan and Capitol. He alone was responsible for the commission of the unfair labor practice that led to the Board's remedial order. He alone decided to move from the Jersey City location and claim that Metropolitan was defunct, when, in fact, he continued doing business as Metropolitan and then as Capitol in Union City.

Further, Kavountzis has impeded the Board's efforts to obtain all of the relevant business records which might shed light on the extent to which Capitol continued Metropolitan's business. Nevertheless, Board counsel was able to uncover some financial data pertaining to Metropolitan and Capitol which tended to show that Kavountzis sometimes commingled the funds of his companies and on at least one occasion, deposited corporate funds in his own accounts. By failing to produce additional documentation to rebut the inference of commingling as evidenced in Board Exhibit 3A, Kavountzis has made it difficult to determine whether the corporations' assets and affairs were separately and distinctly maintained.

As discussed above, it is fair to infer that Kavountzis engaged in the obstructive and duplicitous conduct outlined above to deliberately frustrate enforcment of the Board's order against Metropolitan. Accordingly, I agree with Board counsel that he is the alter ego of Capitol. It follows that he is jointly and severally liable with his Company for backpay owed to the former Metropolitan employees. The backpay period which began on May 24, 1986, 5 days after the Board's decision and order issued, continues to such time as Respondents Capitol and Kavountzis bargain with the Union as provided in the Board's remedial order.[18]

[17] See also *Campo Slacks Inc.*, 266 NLRB 492 (1983); *Bryar Construction Co.*, 240 NLRB 102 (1979); *Ogle Protection Service*, 149 NLRB 545, 546 (1947), cited in *Weldment Corp*, supra.

[18] Having concluded that Metropolitan, Capitol, and Kavountzis are alter egos, accountable jointly and severally for complying with the Board's remedy, it is unnecessary to reach the question of whether the Respondents also are liable as successors under the Supreme Court's holding in *Golden State Bottling Co. v. NLRB*, 414 U.S. 1681 (1973).

The Employees' Interim Earnings are Correctly Specified

The legal principles which govern resolution of backpay disputes are firmly entrenched in Board and court precedent. Briefly stated, they provide:

> in a backpay proceeding, the sole burden on the General Counsel is to show the gross amount of backpay due. . . . Once that is established, the burden is upon the employer to establish facts which would mitigate that liability.[19]

As explained above, I granted Board counsel's motion to strike the Respondent's answer as deficient with respect to paragraphs I and III of the compliance specification; i.e., the backpay period and the measure of gross backpay, respectively. Having resolved any question regarding the validity of the gross backpay figures as set forth in the compliance specification appendix, the remaining issue, for which the Respondents bore the burden of proof, concerned the discriminatees' interim earnings. In meeting this burden Respondents were entitled to produce evidence to show that the claimants ''willfully incurred a loss of earnings during the backpay period or for some other reason [are] not entitled to receive backpay'' during the relevant period. *Original Oyster House*, 281 NLRB 1153, 1154 (1986), enfd. 822 F.2d 412 (3d Cir. 1987).

Prior to the start of the instant hearing, Board counsel furnished to Respondent the names and current addresses of the 12 former Metropolitan employees who had been located. The Respondents subpoenaed five of these claimants and adduced testimony from four of them in order to prove either that they had failed to search diligently for new employment or that they had not accurately reported the interim earnings as set forth in the appendix to the compliance specification. Respondent did not succeed in this effort.

Respondent admittedly confronted a difficult situation in examining the discriminatees. Several appeared not to understand certain questions as originally posed; their answers often were difficult to understand since they spoke heavily accented English which was their second language. However, their inability to answer questions on the first round had nothing to do with their credibility. Before their testimony was concluded, each of them had credibly confirmed the accuracy of the interim earnings data presented in the appendix to the compliance specification. Thus, Respondent was unable to prove that any of them had failed earnestly to seek alternative employment or that had not accurately reported their interim earnings to the Board. Indeed, apparently recognizing that the four discriminatees were struggling to answer questions as honestly and forthrightly as they could, Respondent chose not to call a fifth subpoenaed claimant and did not even address the issue of interim earnings in its brief. In sum, Respondents have failed to show that the claimants who were located did not make a good-faith search for employment during the backpay period or that their interim earnings were not accurately reported in the compliance specification appendix.

[19] *Hacienda Hotel & Casino*, 279 NLRB 601, 603 (1986); *Laborers Local 38 (Hancock-Northwest)*, 268 NLRB 167, 168–169 (1983).

Accordingly, on these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondents, Metropolitan Teletronics Corp., Capitol Electronics of 4109, Inc., and Alpay Kavountzis, an Individual, Union City, New Jersey, their officers, agents, successors, and assigns, shall make whole Berenice Aracena, Juan Aybar, Flor Baez, Catherine Brockington, Jennifer Dolphon, Maria Elizondo, Julia Fernandez, Lillian Fernandez, Rosa Florindo, Maday Garcia, Maria Garcia, Mercedes Georges, Myrna Gill, Orlando Gomez, Pedro Gonzalez, Illera Idalra, Kyriakos Katsaras, Nelson Marroquin, Angel Martinez, Fernando Montoya, Julio Novas, Mayra Nunez, Samuel Paige, Vyacheslow Patish, Altagracia Perez, Daniel Pimental, Bayron Plaza, Almarie Pryce, Bievenido Rivera, Josephina Rodriguez, Maria, Rey, Carmen Rojas, Sonia Rosario, Edith Seinman, Israel Serrano, Maria Soto, Huang Kim Tang, Tamara Uretskaya, Luz Webb, and Marek Wisniewski, by paying them the sums listed in paragraph VIII of the compliance specification, which total $1,090,163 plus interest thereon, accrued to the date of payment and computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[21]

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] In the compliance specification, the Regional Director for Region 2, notes that he has been unable to locate some of the above-named employees; specifically, Berenice Aracena, Juan Aybar, Jennifer Dolphin, Maria Elizondo, Julia Fernandez, Lillian Fernandez, Maday Garcia, Mercedes George, Myrna Gill, Pedro Gonzalez, Illera Idalra, Nelson Marraquin, Angel Martinez, Julio Novas, Mayra Nunez, Vyachelov Patish, Altagracia Perez, Daniel Pimental, Almarie Pryce, Josephine Rodriguez, Maria Rey, Sonia Rosario, Edith Seinman, Israel Serrano, Mario Soto, Huong Kim Tang, Tamara Uretskaya, and Luz Webb. Accordingly, in accordance with Board procedures, the net backpay amounts set forth in par. VIII of the compliance specification, will be retained in escrow for a period not to exceed 1 year. The escrow period shall begin after Respondents comply with the Board's Order by payment into escrow or the date the Board's Supplemental Decision and Order in this case become final, including enforcement thereof, whichever is later, to permit further efforts to locate and distribute to these employees the money owed them. See *Starlight Cutting*, 284 NLRB 620 (1987).